North Dakota Law Review

Volume 48 | Number 4 Article 3

1972

Submarginal Lands: An Instance of How the Legislative Process Fails Native Americans

Harold M. Gross

SUBMARGINAL LANDS: AN INSTANCE OF HOW THE LEGISLATIVE PROCESS FAILS NATIVE AMERICANS

HAROLD M. GROSS*

The doctrine of *stare decisis* provides some degree of predictability to the way in which courts will decide an issue. In Congress' dealings with American Indians the doctrine has been used primarily as an excuse for legislative inaction on particular measures. For example, in the 60-year struggle of the Taos Pueblo to regain its sacred Blue Lake,[1] the arguments against the proposal were systematically discredited until the time of the final vote on the Senate floor,[2] when *opponents* of the return of the lands and lake to the people of Taos argued that although the Taos case might in itself be just, the return of this area to the Pueblo would create an unfortunate precedent, which would, in the words of Senator Henry M. Jackson (D-Wash.), Chairman of the Senate Interior and Insular Affairs Committee, "have the effect of opening all lands within the national parks, forests, monuments and recreation areas to land claims by Indian tribes all across the Nation."[3]

Senator Jackson and the small number of his like-minded colleagues who voted with him[4] had failed to note that the Taos case was easily distinguishable on its facts from any other known claim for land wrongfully taken from American Indians.

But even if Senator Jackson's contention was correct (that a flood of Indian tribal claimants to public lands would, as a result of the passage of the Taos bill, make legislative claims for land allegedly wrongfully seized by the United States), it seems questionable to preclude Congress from enacting legislation to justly remedy a single meritorious claim on the sole ground that others

---

* Director, Indian Legal Information Development Service, Washington, D.C.; Member, California & Oregon Bars; Member, Bar of the Supreme Court of the United States; B.A., Stanford University, 1957; J.D., 1961. Mr. Gross has also served as staff counsel to the National Congress of American Indians and as a professional staff member on the Senate Special Subcommittee on Indian Education.

1. Blue Lake bill signed by President Nixon, December 15, 1970; Pub. L. No. 91-550, 84 Stat. 1437-39.
2. December 2, 1970.
3. S 129221, 91st Cong., 1st Sess. (1970).
4. The final vote was 70-12, S 19244, 91st Cong. 1st Sess. (1970).

with similar grievances will thereafter seek similar relief. Yet, history reveals that this argument is frequently made.

Whether the same relief will be granted in other cases remains in the exclusive province of Congress to decide as each case arises.

The argument based on *stare decisis* would be much more persuasive if Congress was compelled to follow precedent and grant such relief whenever asked, regardless of the merits of a particular claim. The argument would also appear logical if Congress, faced with compelling policy reasons for not providing relief (in this case the return of land), would nevertheless be compelled by its previous action to make legislative land grants. However, since Congress can, and often does, ignore its own precedents, this argument is not persuasive at all.

This article will examine in some detail the 38-year history of "submarginal lands" purchased for, but never delivered to, specific Indian tribes. An examination will also be made of the way in which the legislative process protects or attempts to restore the land base of the Indian tribes.

John Collier was named Commissioner of Indian Affairs in 1933. Collier's 12-year term of office was the longest of any Indian Commissioner,[5] and certainly one of the most progressive. The most important Indian legislation during Collier's term of office was the Indian Reorganization Act (IRA) of 1934[6] which ended the disastrous "Allotment Period"[7] of Indian affairs administration. The IRA was designed to provide legislative authority for the implementation of Collier's policies. These policies were described as: "Economic rehabilitation of the Indians, principally on the land; organization of the Indian tribes for managing their own affairs; civil and cultural freedom and opportunity for the Indian."[8]

Under the IRA tribal governments which accepted the provisions of the act were reorganized and an attempt was made to repurchase land within pre-existing reservation boundaries which had been alienated from Indian hands during the Allotment Period.[9] During this period the land in Indian ownership had diminished from 140 million to 50 million acres. More over, the remaining land was often the least desirable.[10]

Among the economic problems faced by the Roosevelt Admini-

5. 1933-1945.
6. Wheeler-Howard (Indian Reorganization) Act of June 18, 1934; 48 Stat. 984; 25 U.S.C. §§ 461-478.
7. 1887-1934.
8. J. COLLIER, FROM EVERY ZENITH, A MEMBER 173 (1963).
9. This period commenced with the enactment of the General Allotment Act of Feb. 8, 1887, 24 Stat. 388; 25 U.S.C. §§ 331-357, and continued until the IRA was enacted.
10. SENATE SPECIAL SUBOOMM. ON INDIAN EDUCATION, INDIAN EDUCATION: A NATIONAL TRAGEDY - A NATIONAL CHALLENGE, 91st Cong. 1st Sess. 150 (1969) [hereinafter cited as INDIAN EDUCATION].

stration was that of the small farmers, who had been affected both by plummeting crop prices brought on by the Depression and by a series of natural disasters which included floods, droughts, plagues and dust storms.[11] Of particular concern were those farmers whose operations had been "marginal" for a number of years. Beset with the aforementioned problems, operators of these farms ceased to break even. Although in nearly all instances the land itself was overworked and depleted, the term "submarginal" refers to the fiscal condition of the operation, not to the condition of the land itself.

It is ironic that only when the land had been depleted to the point where it could no longer provide subsistence income did the government consider its return to the Indian reservations from which it had been taken. It is interesting to note that as the value of the land also increased, the reluctance of the government to return the land also increased. It is also significant that the Indian tribes were eager to obtain the land, which they felt they desperately needed, in spite of its submarginal status.

On May 12, 1933, the Federal Emergency Relief Administration was established[12] to cooperate with the states in relieving hardships caused by unemployment and drought. A system of State Emergency Relief Administrations was set up under the direction of the Administrator of the FERA. The state agencies were authorized to expend some program funds to relieve both "ward and non-ward Indians" in dire economic straits.[13]

In the meantime, the *national* Land Program was promulgated to accomplish "the purchase and retirement from farming of unprofitable, badly-eroded, thin-soiled and exhausted land and the removal of the occupants to other more promising areas where they could be rehabilitated and thus taken off the relief rolls."[14] Another stated objective of the Land Program was "improvement of the economic and social status of 'industrially stranded population groups' occupying essentially rural areas, including readjustment and rehabilitation of the Indian population by acquisition of lands to enable them to make appropriate and constructively-planned use of combined land areas in units suited to their needs."[15]

Congress, under Title II of the National Industrial Recovery Act[16] provided authority for the creation of an agency to administer the selection and purchase of "submarginal land." The necessary

11. THIS FABULOUS CENTURY: 1930-1940 46 (Time-Life Books).
12. Act of May 12, 1933, ch. 30, 48 Stat. 55.
13. Letter from Harry L. Hopkins, Administrator, Federal Emergency Relief Administration, to State Emergency Relief Administrators, July 17, 1933.
14. Public Land Law Review Commission, History of Public Land Law Development 599 (1968).
15. Memorandum from John S. Lansill, Director, Land Program, Federal Emergency Relief Administration, to Secretary of the Interior Harold L. Ickes, July 16, 1934.
16. Act of June 16, 1933, 48 Stat. 200.

funds were appropriated under the Emergency Relief Appropriation Act[17] and specific Congressional authorization for the Land Program was provided[18] which gave the President broad discretion to carry out his program:

> There is hereby made available, out of any money appropriated by the Emergency Relief Appropriation Act of 1935, such amount as the President may allot for the development of a national program of land utilization. *The sums so alloted may be used, in the discretion and under the direction of the President, for the acquisition of submarginal lands and their use for such public purposes as the President shall prescribe. . . .*[19] (Emphasis added)

An original grant of $25 million was made to the FERA for the purchase of submarginal lands. Of this amount, the Roosevelt Administration initially decided that $2.5 million would go for Indian land projects in which the submarginal land to be purchased was to be used primarily for the benefit of those Indians who were under the jurisdiction of the Bureau of Indian Affairs.

The Director of the Land Program instructed Commissioner Collier to "submit at the earliest moment projects totalling this amount," and also to propose another $1.5 million in future submarginal land acquisition projects. The Director stressed the urgency of immediate action: "It is extremely important that the land purchase program begin at once. Any help that you can give to speed up operations will be appreciated. The Land Program is anxious to cooperate with you fully."[21]

By October, 1934, the amount of money allocated for acquisition of submarginal land to be used in Indian land projects had been increased to $5 million, and five types of Indian "demonstration areas" where funds could be used to accomplish the purposes of the program had been authorized. These included: (1) checker-boarded areas; (2) watershed or water control areas; (3) additional lands to supplement reservations; (4) land for homeless Indian bands or communities forming acute relief problems; and (5) lands needed for proper control of grazing areas.[22]

The Director of the Land Program and the Commissioner of Indian Affairs presented a Joint Policy Statement on January 1, 1935, announcing that the objective of the Indian portion of the Land Pro-

---

17. Act of April 8, 1935, 49 Stat. 115.
18. Title I, § 55, 49 Stat. 750, 781 (1935).
19. *Id.*
20. Letter from J.S. Lansill, Administrator, Land Program, FERA, to John Collier, Commissioner of Indian Affairs, Department of the Interior, July 14, 1934.
21. *Id.*
22. Letter from J.S. Lansill to William Zimmerman, Ass't. Commissioner of Indian Affairs, October 22, 1934.

gram was to "acquire lands for Indian use which will improve their economy and welfafre and lessen relief costs. . . ."[23]

The process of acquiring submarginal lands was begun by the FERA in 1934. The Resettlement Administration, created by Executive Order on April 30, 1935,[24] assumed the responsibility of administering the Land Program. The new agency became part of the Agriculture Department in 1935,[25] changing its name to the "Farm Security Administration" (FSA). As a result, submarginal lands are referred to in some places as "FSA lands."[26]

Commissioner Collier identified appropriate Indian land projects. In October, 1936, a *Memorandum of Understanding* was executed between the Resettlement Administration and the Bureau of Indian Affairs which identified ten projects involving 265,944 acres of submarginal land in Montana, North Dakota and South Dakota, which was to be acquired "for *the exclusive benefit of Indians.*"[27] (Emphasis added). Eight of the ten projects were entirely within the boundaries of existing Indian reservations—the remainder were partially within those boundaries. The language in the preamble of the *Memorandum of Understanding* makes the purposes for which the land was to be acquired unmistakably clear.

> Whereas, the Resettlement Administration is now engaged in a land acquisition program in connection with certain projects for the exclusive benefit of Indians; and "Whereas, the lands being acquired under this program are situated almost entirely within existing Indian reservations *to which they are intended for addition* for the purpose of providing subsistence farm sites and consolidated grazing areas for the exclusive use of Indians. . . .[28] (Emphasis added).

The purpose of the *Memorandum* was to spell out ground rules allowing the Bureau of Indian Affairs to exercise *temporary* supervision over the lands during the period necessary to complete acquisition of land title by the Resettlement Administration.

The *Memorandum* concluded:

> Upon the consummation of its land acquisition program in connection with the projects listed. . ., the Resettlement Administration will concur in appropriate recommendations made by the Department of the Interior to Congress *for in-*

23. Joint Policy Statement, Administrator Lansill and Commissioner Collier, January 1, 1935.
24. Exec. Order No. 7027, April 30, 1935; as amended by Exec. Order No. 7041, May 15, 1935; as amended by Exec. Order No. 7,200, Sept. 26, 1935.
25. Exec. Order No. 7530, 3 C.F.R. 236 (1936-38 Comp.); as amended by Exec. Order No. 7557, 3 C.F.R. 251 (1936-38 Comp.).
26. *E.g.*, Stockbridge-Munsee Indian Community, Wisconsin.
27. Memorandum of Understanding between Resettlement Administration and Bureau of Indian Affairs, October 19, 1936.
28. *Id.*

corporation of these projects lands into the Indian Reservations respectively indicated. . . .[29]

On August 11, 1937, the Secretary of Agriculture, who had authority over the Resettlement Administration, wrote to the Secretary of the Interior asking that 11 additional submarginal land acquisition projects be included within the terms of the previous *Memorandum of Understanding*, making a total of 21 projects in all, encompassing 402,533 acres of land.[30]

Among the new projects were five which fell into the category of "lands for homeless Indian bands forming acute relief problems."[31] Two of these projects were for the benefit of the Cherokee Tribe of Oklahoma, and there was one project for both the Seminole Tribe of Florida and the Burns Paiute Colony of Oregon and the Stockbridge-Munsee Community of Wisconsin.

Of the sixteen other projects included in the total, *thirteen proposed to return* to the Indian land *entirely* within the boundaries of *existing* Indian reservations. The following projects were included in this group: L'Anse, Michigan; White Earth (Minnesota Chippewa Tribe—2 projects), Minnesota; Bad River and Lac Court Oreilles, Wisconsin; Forts Peck and Blackfeet, Montana; Fort Totten, North Dakota; Standing Rock, North and South Dakota; Pine Ridge, Rosebud (2 projects), and Lower Brule - Crow Creek (2 reservations, 1 project), South Dakota.

The other three projects were partially within existing reservation boundaries at Fort Hall, Idaho; Fort Belknap, Montana; and Cheyenne River, South Dakota.

On April 15, 1938, by Executive Order,[32] President Roosevelt transferred jurisdiction over the lands within the 21 project areas to the Secretary of the Interior, subject to retention by the Secretary of Agriculture of only such jurisdiction as was necessary to complete acquisition of the lands. The Executive Order contained a detailed description of the lands transferred.

Under a separate series of Executive Orders,[33] but under the same program and legislative authority, approximately 457,530 acres of submarginal lands were transferred from the Agriculture Department to the Interior Department, to be administered for the benefit of the following Puebloes: Jemez, Zuni, San Ildefonso, Zia, Santa

29. *Id.*
30. Letter from Henry A. Wallace, Secretary of Agriculture, to Harold L. Ickes, Secretary of the Interior, August 11, 1937.
31. *See* note 22 *supra.*
32. Exec. Order No. 7868, 3 C.F.R. 395 (1936-38 Comp.).
33. Exec. Order No. 7792, 3 C.F.R. 350 (1936-38 Comp.); Exec. Order No. 7975, 3 C.F.R. 128 (1938 Supp.); Exec. Order No. 8255, 3 C.F.R. 224 (1939 Supp.); Exec. Order No. 8471, 3 C.F.R. 165 (1940 Supp.); Exec. Order No. 8472, 3 C.F.R. 165 (1940 Supp.); Exec. Order No. 8696, 3 C.F.R. 180 (1941 Supp.); Exec. Order No. 8697, 3 C.F.R. 181 (1941 Supp.).

Ana, Laguna, Acoma and Isleta. An additional 78,372 acres of submarginal land was separately acquired for the Jemez and Zia Puebloes.[34]

In May, 1938, the Assistant Commissioner of the Bureau of Indian Affairs sent an explanation of the Land Program and the effect of the Presidential orders upon it, to all effected BIA agency superintendents:

> The title to these lands is taken in the name of the United States, and they will not become the property of the Indian tribe, for whose use they were purchased, *until Congressional action is obtained specifically transferring such titles.* (Emphasis added)
> However, the lands. . . should, from the standpoint of administration, be treated as though they were tribal lands and any use thereof should be taken up with the tribal council. . . .[35]

Subsequent developments in this area are remarkable in light of the fact that the original policy was so clearly stated.

In addition to the foregoing statements, the agency superintendents were told that although

> these lands were purchased for Indian use . . . if it is found impracticable at the moment for Indians to use a portion thereof, you are authorized to issue use permits to non-Indians in accordance with regulations now in force *governing Indian tribal lands.* The revenue obtained from that source should be taken up and carried as 'Special Deposits' until such time as more definite instructions are given you.[36] (Emphasis added)

Note that non-Indian use was considered appropriate *only* when Indian use was "impracticable," and that the land was to be treated as tribal land, and that the revenue was to be set aside, *not* deposited in the United States Treasury.

Another Executive Order[37] transferred two additional sections of submarginal land in Sioux County, North Dakota, from the Agriculture Department to the Department of the Interior, to be administered along with the rest of the project previously transferred for the benefit of the Standing Rock Sioux Tribe. The significance of the late transfer is that the land to which this last Executive

---

34. *See* note 33 *supra.*
35. Letter from J. M. Stewart, Ass't Commissioner (Lands), Bureau of Indian Affairs, to Peru Farver, Superintendent, Tomah Agency (Stockbridge-Munsee), Wisconsin, May 26, 1938.
36. *Id.*
37. Exec. Order No. 8473, 3 C.F.R. 165 (1940 Supp.).

Order applies *is* subject to Title III of the Bankhead Jones Act,[38] which provides that a percentage of the income derived from it be paid to the state, in lieu of taxes, for use within the county in which the land is located. Only transfers from the Department of Agriculture occurring after June 9, 1938, are subject to the Bankhead-Jones Act.[39] Thus, most of the Indian submarginal lands are *not* within the provisions of this Act.

After receiving the Assistant Commissioner's letter in May of 1938, the BIA agency superintendents created an attitude of expectation among concerned tribal groups that trust title to the submarginal land parcels would soon be routinely turned over to the tribes for which they had been purchased by Congressional action. Tribes were encouraged to use the land as though it were already theirs. At the L'Anse Reservation in Michigan, for example, where the housing situation was desperate, 13 homes were built on the submarginal land parcel, with federally-approved rehabilitation funds.[40]

The homes were occupied by tribal members who maintained them on the assurance that beneficial title to the land would soon be in the hands of the tribe. After several years uncertainty began to develop as tribal members realized that the government could dispossess the occupants with little notice, since title remained in the federal government. Under these conditions the Indians became reluctant to expend their scarce resources on maintenance of the buildings, and the houses fell into disrepair. Much of this housing was subsequently abandoned, although the need for housing on this reservation remains critical.[41]

A similar situation exists at the Stockbridge-Munsee Reservation near Bowler, Wisconsin. The tribal history is similar to that of other small eastern tribes. The Mohican Indians originated in Massachusetts and were pushed westward during the early colonial period into New York State, where they joined the Stockbridge, Brotherton, and other small tribes. Then known as the Stockbridge Band of Mohican Indians, they were included in the Six Nations Treaty with the United States in 1794.[42]

Less than 30 years later, in 1822, the Government broke the Treaty, pushing the tribe further west into Wisconsin with other "Emigrant New York Indians." The tribe again signed a treaty. It guaranteed their right to live in peace on the shores of Lake Winne-

38. Title III, § 32(a), and Title IV, § 45, Bankhead Jones Farm Tenant Act of July 22, 1937, 50 Stat. 522, 525.
39. Exec. Order No. 7908, 3 C.F.R. 49 (1938 Supp.).
40. Interviews with tribal elders, July, 1970.
41. *Id.*
42. Treaty of October 22, 1794, 7 Stat. 15.

bago.[43] At this time they were joined by the Munsee, a band of Delaware Indians which had originated in Pennsylvania.

In 1856 the Stockbridge-Munsee band was again forced to cede their land to the government, this time in exchange for a tract of land farther north, consisting of 23,040 acres purchased from the Menominee tribe by the federal government.[44] This parcel encompassed what is now their reservation.

In the 1870's, as a result of the Allotment Act, valuable pine lands on the reservation were sold by the government without notice to the tribe. Lumbermen removed the timber, leaving the tribe no means of subsistence beyond the sale of produce from meager gardens.[45]

By the end of the "Allotment Period" in 1934 little more than 100 acres of the original reservation remained in Indian ownership. Landless and in desperate economic straits the Stockbridge-Munsee community became one of those which received early attention from Commissioner Collier.

The Resettlement Administration approved Collier's request for the purchase of 13,077 acres of submarginal land within the original reservation boundaries for the Stockbridge-Munsee Tribe, and recommended to Collier the purchase of an additional 3,000 acres with IRA funds to block out an entire area for the tribe and provide a reasonable land base.

Collier initially authorized the purchase of 1,050 acres with IRA funds and the Resettlement Administration, acting as purchasing agent for the BIA, completed the purchase. A reservation was proclaimed on March 19, 1937, consisting of 1,250 acres for the use and benefit of the Stockbridge and Munsee Band of Mohican Indians of Wisconsin. Subsequently appropriated IRA funds were used to purchase another 1,200 acres of land for the tribe.[46]

No one considered the IRA-purchased land sufficient for the needs of the tribe, except in conjunction with the 13,077 acres of submarginal land also purchased for the benefit of the tribe, title to which has never been delivered to the tribe by the federal government.

Having relied on the representations of BIA officials that delivery of beneficial title to the submarginal lands was imminent and having been assisted with federal rehabilitation funds, the Indians built 40 residences on the submarginal land parcel.[47] There are now 152

43. Treaty of Sept. 23, 1822, (unratified).
44. Treaty of Feb. 5 ,1856, 11 Stat. 663.
45. FEDERAL AND STATE INDIAN RESERVATIONS, AN EDA HANDBOOK, U.S. DEPT. OF COMMERCE 411 (1971).
46. Letter from Albert Huber, Acting Deputy Assistant Commissioner of Indian Affairs to Senator William Proxmire, July 12, 1968.
47. Interviews with tribal elders, July, 1970.

people living in this housing, a greater number than live on the tribally-owned, IRA-purchased land.[48] Title to the submarginal land remains in the United States, and because of this periodic rumors of the withdrawal of the land serve as a basis for tribal insecurity and demoralization. As at L'Anse, about half of the houses on submarginal land are now in poor condition. Additionally, any attempt at tribal economic development is blocked by the inability of the tribe to insure the permanency of its land base.

The submarginal lands at Stockbridge-Munsee and L'Anse were, at the time of acquisition, primarily cut-over timber land. The same was true of the parcels at Lac Court Oreilles and Bad River, Wisconsin, and the two projects on the White Earth Reservation of the Minnesota Chippewa Tribe. At L'Anse, the timber land was preserved, but no use of the land or timber cutting was permitted by BIA officials from 1938 through 1963. At the other four reservations where the submarginal land was primarily timberland, timber cutting was limited by BIA edict to land clearing and salvage operations from 1938 until 1962, when a directive from Washington, D. C., authorized commercial timber harvesting. In 1962 at Lac Court Oreilles and White Earth, 1963 at Bad River, and 1964 at Stockbridge-Munsee and L'Anse, the BIA began collecting revenues from timber-cutting permits which were issued to competitive bidders who could meet BIA bonding requirements. More often than not the successful timber contractors were non-Indian. By 1970, the annual revenue from timber permit sales amounted to more than $10,000 on four of these five reservations, the sole exception being L'Anse.[49] All the money so obtained went to the federal government, not to the tribes.

The submarginal land parcels in North Dakota, South Dakota, Montana, Idaho, and Oregon consisted primarily of grazing land which had been initially assigned to the tribes without charge. At the Fort Totten Reservation of the Devils Lake Sioux Tribe in North Dakota, the lands were assigned in 1938 for the use of the Fort Totten Indian School farm.

In 1938, bills designed to deliver trust title to the respective tribes began to appear in Congress. House passage was obtained in a few instances before 1940, but the Senate Indian Affairs Committee refused to report the bills to the Senate floor.

In the early 1940's Collier's progressive policies in the BIA caused increased friction within both the Senate and House Indian Affairs Committees.[50] Although the BIA has often been criticized for the

48. Testimony of Stockbridge-Munsee Community delegation before Senate Interior and Insular Affairs Committee, March 29, 1971.
49. Gross, *Indian Submarginal Lands: An Unresolved Problem*, National Council on Indian Opportunity, May, 1971, Exhibit 21.
50. INDIAN EDUCATION, *supra* note 10, at 157.

failure of its policies to provide appropriate or beneficial services to Indians, the Bureau has rarely had any voice in its own policies. Housed within the Interior Department, and subject to the pressures emanating from both the House and Senate Interior and Insular Affairs Committees (previously the House and Senate Indians Affairs Committees), the BIA is a puppet agency controlled by hands unfriendly to Indians.

During the war years the BIA central office was moved from Washington, D. C., to Chicago, and funds for all domestic programs were drastically curtailed. The Commissioner was in no position to push for action on the submarginal land legislation.[51]

The friction between the BIA Commissioner and Congress became severe in 1944, when a Select Committee of the House of Representatives, which included present Senate Interior Committee Chairman Jackson, then serving in the House, offered recommendations for what it called "the final solution of the Indian problem."[52] The Report called for a return to old, discredited policies of Indian cultural genocide, by coercive assimilation, while reflecting Collier's bi-cultural approach. Collier resigned the following year, and the stage was set for ushering in the "termination period."

Until 1944, although beneficial title to the submarginal lands had not been delivered to the tribes for whose benefit they had been purchased, the use of the land had been assigned to the tribes, in most instances without charge. In 1944, BIA officials, aware of Congressional attitudes, ceased assuming that legislative transfer of title to the tribes was imminent, although the Interior Department was still on record in support of such legislation.

Gradually, the assignments of submarginal grazing land to tribes were cancelled, and the tribes were authorized to use the land under the authority of "revocable permits" which emphasized the power of the government to withdraw the right to use the land at any time. The initial revocable permits were for ten-year periods, for which the tribe paid a relatively nominal fee.[53] Later, the permits were issued at higher rates, for periods of three years or less.

The timber lands on the "Eastern" reservations of Michigan, Wisconsin and Minnesota continued to be treated restrictively. An unusual arrangement was made with the Paiute Colony at Burns, Oregon, where in 1947 the submarginal land was *leased* to the colony for five years. Prior to this time, receipts, amounting to $1,165 from

51. *Id.* at 156.
52. HOUSE SELECT COMM. TO INVESTIGATE INDIAN AFFAIRS AND CONDITIONS, 78th Cong., 2d Sess., AN INVESTIGATION TO DETERMINE WHETHER THE CHANGED STATUS OF THE INDIAN REQUIRES A REVISION OF THE LAWS AND REGULATIONS AFFECTING THE AMERICAN INDIAN, 11 (1944).
53. *Gross, supra* note 49.

shares of crops raised on the small agricultural parcel (606 acres) had been deposited in the United States Treasury.[54]

The reader should note that the legal authority for administration of these lands by the Interior Department had not changed *at all.* The Department was still authorized to administer the land for the "exclusive benefit of Indians." The altered administrative arrangement was in direct response to political pressure—nothing more.

In 1946, after a prolonged legislative struggle, Congress approved the creation of the Indian Claims Commission (ICC).[55] The Commission was given authority to set-off funds and property given to Indian tribes by the federal government against awards to the tribes. Certain kinds of beneficial distributions were excepted from the set-off language by the legislation which created the ICC. Among these exceptions were "expenditures under an emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment and for work relief. . . ."[56] Congress recognized the inequity of charging Indians for economic benefits received from a national relief program, when all others receiving benefits faced no such set-off. The Claims Commission itself has held that such language specifically applies to submarginal lands purchased with relief money under the Emergency Relief Appropriation Act of 1935, trust title to which has been delivered to an Indian tribe.[57]

Given the clear language of the statute, supported by the ICC decision, one would assume that the federal government would not seek set-off for the value of submarginal land from ICC claims.

In 1947, a change occurred in respect to the income the tribes were deriving by subletting submarginal land. Federal budget limitations forced a drastic reduction in the personnel of the Bureau of Indian Affairs, and as a result many of the tribes had to employ personnel to administer a portion of the realty functions at the agency level and use the income from submarginal lands to pay the salaries of the employees.[58]

In the same year Congress provided that all receipts from leases

54. BIA, BURNS COLONY LAND REPORT (1966). This Report was used in support of H.R. 15217, 89th Cong., 2nd Sess. (1966).
55. Act of August 13, 1946, ch. 959, § 1, 60 Stat. 1049.
56. Act of August 13, 1946, ch. 959, § 2, 60 Stat. 1050.
57. 24 Ind. Cl. Comm. 1 (1970).
58. Memorandum from Frank P. Briggs, Acting Secretary of the Interior, to the Commissioner of Indian Affairs, Discontinuance of Fees Charged to Tribes for Use of Submarginal Lands, Oct. 22, 1964, at 3.

or permits from minerals in submarginal lands must be deposited in a special fund pending final disposition by Congress.[59]

This legislation reflected doubt by Congress as to whether the income from subsurface rights should be awarded to the tribes along with the trust title to the lands. As the value of these subsurface rights increased, doubt hardened into resistance to the point at which even accrued surface rentals were being withheld. This policy appears to be based on the principle that a contribution to the welfare of an Indian tribe must be without value before it can be made, and some way must be found to withhold or recover it from the Indians if it turns out to have unexpected value.

Meanwhile, Congress demonstrated a willingness to pass submarginal land legislation for the benefit of Indian tribes, even in the adverse political climate of the termination period. On August 13, 1949 precedent was established when the trust title to the 457,530 acres of submarginal land held by the Interior Department for the various Puebloes listed above, was delivered to them by Act of Congress.[60] This same legislation conveyed trust title to an additional 154,502 acres of land *withdrawn from the public domain* to the Canoncito Navajo tribe of New Mexico.[61]

Under the terms of the 1949 Pueblo legislation the funds held in the "Special Deposits" accounts, which had accrued from the issuance of livestock crossing permits and grazing permits, were awarded to the Puebloes. The Indian Claims Commission was *not* given jurisdiction to consider whether the value of the land transferred, or the value of the accrued funds, should be set-off against any tribal claims.

Senator Anderson (D-N. M.), who in 1972 is the ranking Democrat on the Senate Interior Committee,[62] had good reason in 1949 to remember the purposes for which the submarginal land had been purchased. Anderson, Secretary of Agriculture from 1945-1948, had been a field administrator of the FERA during 1935 and 1936 and was involved in the purchase of much of the submarginal land.

The support of the Executive Branch for legislation delivering trust title to submarginal land to the Indian tribes for which they were purchased continued even though the political party controlling the White House changed. Begun under the Democratic Roosevelt Administration; continued during the Democratic Administration of President Truman, who signed the 1949 Pueblo submarginal

59. Act of August 7, 1947, ch. 513, § 6, 61 Stat. 913, 915.

60. Act of Aug. 13, 1949; Pub. L. No. 81-226; 63 Stat. 604; 25 U.S.C. § 621. This legislation was passed under the leadership of Senator Clinton P. Anderson (D.-N.M.).

61. S. REP. No. 549, 81st Cong., 1st Sess. 4 (1949). Senator Clinton P. Anderson, "Declaring that the United States holds Certain Lands in Trust for the Pueblo Indians and the Canoncito Navajo Group."

62. Senator Anderson's term expires Jan. 3, 1973. He has announced that he will not seek re-election.

land bill into law, the program received the blessing of the Republican Eisenhower Administration. On April 17, 1953, Secretary Douglas McKay of the Interior and Insular Affairs[63] reported favorably to the House Committee on three bills pending before it[64] which proposed to deliver trust title to submarginal lands to several Indian tribes. The House thereupon passed and sent the three bills to the Senate. Paradoxically, this was the same House which conceived and passed the now infamous termination policy resolution.[65]

Secretary McKay's report of passage of the Indian submarginal land legislation was completely consistent with the past policy of the Interior Department, but it enraged Senator Hugh Butler (R-Nebraska), who was beginning his chairmanship of the Senate Interior Committee.

On April 23, 1953, Senator Butler wrote to Secretary McKay,[66] asking to have the departmental reports on the House-passed submarginal land bills "restudied." He made explicit his opposition to these bills, and the reasons for it. It is interesting to note that Butler's statements are the only Congressional statements on record in the history of these proposals which specifically oppose enactment of the legislation.

Senator Butler's three-page letter contained a number of historical inaccuracies, as well as omissions of pertinent facts. Among other things, he stated:

> During the past several Congresses there have been introduced similar bills and general bills of this nature covering all the so-called submarginal lands, transferring trust title to the various Indian tribes or bands involved. Attempts by the Indian Bureau and the Interior Department to have Congress enact such legislation have failed. A few such bills have passed the House, but in every case they have failed to get the approval of the Senate Committee.[67]

Senator Butler neglected to mention the passage of submarginal land legislation in 1949, four years earlier, delivering trust title to the New Mexico Puebloes.

Butler further stated:

> For a period of approximately 10 years subsequent to 1933, these lands were leased directly to the lessee and the

63. REP. OF SECRETARY OF THE INTERIOR TO THE HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 83rd Cong., 1st Sess. re. H.R. 1551, H.R. 1843, and H.R. 2130, 83rd Cong., 1st Sess. (1953).

64. H.R. 1551, H.R. 1843 and H.R. 2130, 83rd Cong., 1st Sess. (1953).

65. H.C.R. 108, 83rd Cong., 1st Sess. (1953) passed the House of Representatives July 27, 1953; the Senate concurred on July 28, 1953.

66. Letter of Senator Hugh Butler, Chairman of the Senate Interior and Insular Affairs Committee, to Douglas McKay, Secretary of the Interior, April 23, 1953.

67. *Id.*

> rentals were deposited in these special accounts. However, someone within the Indian Bureau worked out a scheme whereby the various Indian tribal councils were permitted to lease these lands from the government for two cents per acre and in turn to re-lease the same lands to the actual users at rates from 10 cents to several dollars per acre, thereby making a tremendous profit. This scheme in effect cheated and defrauded the United States Government out of large sums of money.[68]

Again Senator Butler's research was inaccurate. From 1933 to 1943, the land was assigned to the tribes *without* charge and there was no income deposited in the "Special Accounts." The conclusion that the change of policy in 1943, when "revocable permits" were instituted, was to the advantage of the Indians was also incorrect.

Butler also contended that:

> Since the money for purchase of these lands was appropriated directly from the United States Treasury, title to them is in the United States. . . . These bills also provide that all money now on deposit in the special accounts be transferred to Indian use . . . this money belongs to the taxpayers of the United States and should now be converted into the Treasury. It was the taxpayer's money which was used to acquire the land.[69]

This simplistic analysis simply ignored the entire history of the Land Program and the fact that Congress had enacted legislation authorizing the expenditure of funds in the Act of August 24, 1935, for "acquisition of submarginal lands and their use for such public purposes as the President shall prescribe."[70] In addition, Congress had appropriated the money under the Emergency Relief Appropriation Act of 1935,[71] and had approved the transfer of such lands to Indians as an appropriate "public purpose" by passing the legislation in 1949 which transferred submarginal lands to the New Mexico Puebloes.[72]

Butler's analysis further ignored the fact that almost all of the submarginal land involved was *within* the boundaries of existing reservations.

Butler also wrote:

> If these bills are enacted it will open the way for other such bills and eventually permit the transfer of all these submarginal lands and the money now on deposit in the special

68. *Id.*
69. *Id.*
70. *See* note 18 *supra.*
71. *See* note 17 *supra.*
72. *See* note 60 *supra.*

> accounts. . . . In addition, it would create new Indian reservations or add additional areas to existing reservations. It would tend to perpetuate the Indian Bureau and its supervision over the Indians indefinitely. Such a policy will not aid in freeing the Indian from governmental control.[73]

Here, the argument of "bad precedent" was used as an excuse for blocking passage of favorable Indian legislation. Yet in making the argument Senator Butler neglected to mention the 1949 precedent. A response to his argument might ask if passage of the bills before his Committee compelled the "transfer of all of these submarginal lands," why did the 1949 legislation not have a similar effect?

In the final analysis, Butler's argument depended on acceptance of the validity of the termination policy which he espoused: transferring land in trust to Indian tribes is wrong because it tends to perpetuate not the "Indian Bureau," but the tribes. Fortunately, the Senate has twice disavowed the termination policy in recent years,[74] and it seems to have been both abandoned by the Congress, and repudiated by the President.[75]

As to Butler's charge that "Revocable Permits" were a scheme to cheat and defraud the United States, again the Senator seems to have overlooked historical facts in making his conclusion. The tribes previously had free use of the land—only non-Indians were charged. The tribes were displeased with the permit system, the temporary nature of their right to use the land, and indicated that the government might renege on its promise to deliver the land. Rather than "defrauding" the government, the permits provided the "Special Accounts" with income for the first time: at Rosebud, $358 per year; at Pine Ridge, $930 per year; at Lower Brule, $285 per year; at Crow Creek, $509 per year.[76]

Only four years earlier, the 80th Congress had passed legislation that had taken the money out of "Special Accounts" and given it to the various Pueblos of New Mexico. President Truman had signed the bill. If this was a conspiracy to cheat the United States, there were certainly a large number of co-conspirators.

The impact of Senator Butler's letter came not from its persuasiveness, but from the political power wielded by the author as Chairman of the Senate Interior Committee. Whether or not the letter made sense, it could not be taken lightly by the Interior Department.

---

73. Letter of Senator Butler, *supra* note 66.
74. S.C.R. 11, 90th Cong., 2nd Sess., (1968), passed the Senate, Sept. 12, 1968; S.C.R. 26, 92nd Cong., 1st Sess. (1971) passed the Senate Dec. 11, 1971.
75. Richard M. Nixon, Message to the Congress, July 8, 1970, 28 CONG. Q. 1821 (1970).
76. *See* note 49 *supra*.

The effects of the letter are traceable through the chain of command from the Secretary of the Interior, to the Commissioner of Indian Affairs, to the area directors, to the agency superintendents, and back again.

A memorandum from the Commissioner to the area directors summarized the Butler letter in one paragraph concerning the submarginal land bills:

> Senator Butler has taken objection to such legislation. He, apparently, is of the opinion that there is not ample justification shown whereby the various tribes should have ownership of the land and the accumulated proceeds therefrom now held in special deposit accounts.[77]

The Commissioner asked the area directors to obtain answers to a series of specific questions. It was obvious that the Commissioner sought to obtain such "justification."

The Billings, Montana, Director responded in great detail, reaching two conclusions:

> It is evident from our files and information obtained from personnel associated with the acquisition program that these lands were being acquired at that time for Indian use and the matter of transferring to the Interior Department for Indian use or to the Indian tribes themselves was a mere formality. . . .
>
> It is obvious that the differences in income received by the United States Treasury for surface use of such lands which are now in Indian use in respect to such lands used by non-Indians is inconsequential. However, in the matter of leases of oil and gas, a far more adequate return from the submarginal lands within the Indian reservation boundaries would have been realized had those lands been officially transferred to tribal ownership as was contemplated at the time of purchase. It seems to me that the time has come to settle this issue, and have the Congress enact the necessary legislation to vest title in the United States in trust for the respective tribes.[78]

Meanwhile, the BIA succumbed to the pressure created by Senator Butler's letter. In a carefully worded memorandum dated November 23, 1955, Assistant Commissioner Barton Greenwood explained to area directors and accounting offices that the "Special Deposit" accounts created in 1938 should be emptied, and funds

77. Memorandum, Submarginal Land, from Commissioner of Indian Affairs to all area directors (undated), approximately Oct. 22, 1953.

78. Letter from Paul Flickinger, Area Director, Billings Area Office, Montana, to Commissioner of Indian Affairs (undated), received in Washington, D.C., November 30, 1953.

deposited in the United States Treasury to the credit of the appropriate "miscellaneous receipts account," and subsequent receipts should be treated in a similar fashion.[79]

"No purpose would be served," Greenwood wrote, "by continuing to hold this money in special deposits in support of such legislation since it may be provided in this legislation if so desired that such funds on deposit in the Treasury could be credited to the account of the tribe."[80]

Since the same provision could always have been included in the legislation, Greenwood's comments raise an obvious question: If there was no purpose in reserving the funds in special deposit accounts, where they earned no interest for either the tribe or the government, why had it taken the BIA from 1938 to 1955 to realize that the accounts had no purpose?

There *was*, of course, a purpose in keeping the money set aside. Deposit of the money in the United States Treasury diminished the chance that any tribe would ever see it. Once in the Treasury the money no longer had to be dealt with in turn-over legislation. Subsequent bills have not made provision for the delivery of accrued income to the tribes. This not only has given the United States a considerable financial "windfall," but has increased the incentives for federal officials to delay action on turn-over legislation, since longer delay benefits the Federal Treasury.

The BIA also responded to Senator Butler's other complaint. As the ten-year revocable permits, first used in 1944, expired, two administrative changes were made. First, the time periods for the permits were considerably shortened, and second, the formula for computing rents to the tribes was changed to make it more "realistic."[81] The result was a roughly ten-fold increase in the rent payable by each tribe to the United States for the Revocable Permit to use the grazing lands.[82] The old formula was based on a rate of approximately two cents per acre, essentially token consideration. The new rate was based on a charge of approximately one-half of the anticipated rental charge the tribe could expect to receive by sub-permitting the lands to the actual users.

Again, the BIA position made no legal sense except in terms of power realities as a political compromise with the Senate Interior Committee. There *was* a serious legal question as to whether an administrative agency charged with a Presidential mandate of administering lands for the *exclusive benefit of Indians*, and having

79. Memorandum from W. Barton Greenwood, Ass't. Commissioner of Indian Affairs, to area directors and accounting offices, Nov. 23, 1955.
80. *Id.*
81. *See* note 58 *supra.*
82. *See* note 49 *supra.*

no other authority to administer these lands, could legitimately charge the beneficiaries *anything*, except a reasonable fee for administrative expense.

But, if Senator Butler's charge that allowing the tribes to make a "tremendous profit" on the use of lands purchased with "taxpayer's money" constituted a fraud on the taxpayers, diminishing the return to a profit margin of 50 per cent did not cure the fraud. Rather, it added bribery to the list of "crimes." There appears to be no tenable legal theory to support this administrative compromise. Certainly, nothing in the authorizing legislation or Executive Orders requires the Interior Department to obtain an adequate return on the government's investment in the land.

The effect on the reservations of the new policy was severe. At the Rosebud Sioux Reservation, for example, the annual cost of the tribal revocable grazing permit jumped from $358.68 to $6,889.64.[83]

The tribes were offered the new permits on a "take it or leave it" basis. One tribe, the Cheyenne River Sioux, declined to accept the use of its submarginal land parcel on this basis.[84]

Since Senator Butler died before the slow-moving BIA had reacted to his letter, one might have assumed that the late Senator's contentions must have had the support of his surviving colleagues, or the BIA would not have reacted as it did. Yet the contrary is true. Three years after Butler's letter was written, on July 20, 1956, Congress repudiated the letter's assumptions by turning over the 27,000 acre submarginal land parcel in Florida, which Butler specifically refers to in his letter, in trust to the Seminole tribe for whom it had been purchased, creating a *new* reservation out of the submarginal land parcel and a smaller parcel of land purchased for the tribe with IRA funds.[85] In addition, on August 2, 1956, Congress, conveyed the beneficial title to 78,372 additional acres of submarginal land to the Jemez and Zia Pueblos in New Mexico.[86] Thus, Butler's factual assertions and arguments were without merit, and were repudiated by his colleagues. Still, the Indians were the victims of his powerful political influence—neither of the two bills above provided for transfer of the accrued revenue which had been removed from "Special Accounts" and deposited in the United States Treasury.

In 1955 a new dimension was added to the extra-legal considerations delaying delivery of the land to the tribes for whom it had been purchased. The presence of oil and natural gas below the surface of some of the submarginal land was suspected. Mineral leases were issued to speculators at Fort Hall, Idaho; at Pine Ridge, Rose-

83. *Id.*
84. July 1, 1954.
85. Act of July 20, 1956, ch. 645, 70 Stat. 581.
86. Act of Aug. 2, 1956, ch. 886, 70 Stat. 941.

bud, and Cheyenne River, South Dakota; and at Blackfeet, Fort Belknap and Fort Peck, Montana. These leases were administered by the Bureau of Land Management within the Department of the Interior, and considerable revenue which was derived from them went directly into the United States Treasury.[87]

The land had been purchased for "Indian use," for the "exclusive benefit of Indians," to "improve their economy and welfare and lessen relief costs" with specially appropriated Emergency Relief funds. There is no doubt that if the land on some of the affected reservations had been leased with the proceeds going to the tribes, this would have accomplished the purpose of the original act. At Fort Peck, for example, the federal income from mineral leases and royalties during the period from 1955 to 1970 was $2,194,611. Coupled with rents the government collected for surface rights, another $182,740, the amount collected from the Fort Peck submarginal land parcel through 1970 was $2,377,351.[88]

The Fort Peck total is unusually high for two reasons: first, the submarginal acreage at Fort Peck is twice as large as any other parcel, totaling about 90,000 acres. Second, Fort Peck is the one place where oil was actually found.

The old axiom that "possession is nine-tenths of the law" is nowhere better illustrated than here. The federal government paid only $412,302 to obtain the submarginal lands at Fort Peck, to provide for the economic benefit of the Fort Peck Indians. The United States Government has realized a profit on this parcel alone of $1,965,049 through 1970, a windfall resulting from the delay on the part of Congress in enacting necessary legislation to transfer the land. Not only has the Fort Peck Tribe still not received trust title to its submarginal land, but Congress has held up delivery of much smaller and far less valuable parcels to needier tribes for fear that the "legislative precedent" established by passage of such bills would compel enactment of similar legislation with respect to the Fort Peck parcel before that parcel is milked of its last drop of oil. An ironic aspect of this situation is that at Fort Peck the submarginal land is *entirely* within the boundary of the existing reservation.

Only Congressional policy through passage of the Allotment Act of 1887[89] divested the Indian tribe at Fort Peck from the land at issue here, and still again, it was Congressional inaction on proposed legislation which allowed the government to retain title to the land in 1955 when the oil exploration started.

Between 1960 and 1962, as the 3-year revocable permits issued to

87. *See* note 49 *supra.*
88. *Id.*
89. *See* note 9 *supra.*

the tribes expired, further increases in the rentals paid by the tribes were imposed. At Pine Ridge, South Dakota, for example, the annual fee had jumped from $930.44 under the original 10-year permit expiring in 1956, to $12,330 per year for a four-year permit granted in 1962. At Fort Peck, the 10-year permit expiring in 1959 had cost the tribe $1,706.76 per year. The new four-year permits issued in 1960 cost the tribe $27,612.22 per year.[90]

Attorney Marvin J. Sonosky represented five of the tribes with submarginal grazing land, and with the help of some members of Congress, brought the legal mandate upon which its authority to administer submarginal lands depended to the attention of the Interior Department. There was no doubt that the Department's administrative position was legally untenable. Facing this situation, on March 28, 1963,[91] the Department approved a change in fees charged on submarginal land suitable for grazing purposes only to bring these rates into line with those charged for public domain lands permitted under Section 15 of the Taylor Grazing Act of June 28, 1934,[92] resulting in a substantial reduction in the rate.[93] Prior to this change in policy the Interior Department had been charging Indian tribes more to rent submarginal lands supposedly being administered for their benefit than the law allowed for rental of similar lands in the public domain. Caught in this embarrassing position, the Department of the Interior reduced the rates, but of course made no refund for overcharges made while the rates were excessive.

On October 22, 1964, Acting Secretary of the Interior Frank Briggs issued a memorandum to the Commissioner of Indian Affairs entitled "Discontinuance of fees charged to tribes for use of submarginal lands."[94]

> Bearing in mind the purpose for which submarginal lands were originally acquired, our continued re-evaluation of policy considerations leads to the conclusion that the Bureau of Indian Affairs is not justified in making a charge for the permit to these lands.

Secretary Briggs directed immediate discontinuance of future charges for permits, but "[t]o insure uniformity to all tribes, past due charges must be paid as well as those accruing to the date of this memorandum."[95]

---

90. *See* note 49 *supra.*

91. *See* note 58 *supra.*

92. Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, *as amended,* Act of July 26, 1936, 49 Stat. 1967, 1976.

93. *See* note 58 *supra.*

94. *Id.*

Secretary Briggs reviewed the history of the submarginal land program, and concluded:

> The records disclose a complete understanding between the Federal agencies involved in the acquisition and administration of the submarginal lands, that such lands had been selected for acquisition in connection with demonstration Indian projects, were needed by the Indians, and would be utilized by the Indians in connection with utilization of Indian-owned lands, and that proper recommendations would be made at the appropriate time for the enactment of legislation to add permanently those lands to Indian reservations.[96]

Reflecting on the increase in rates for permits expiring subsequent to 1954, Secretary Briggs observed, ". . . with this move to higher rates, the main objective of the purchase of these lands seems to have been overlooked, that is, the transfer of the lands to the Bureau of Indian Affairs for '. . . permanent administration for the exclusive benefit of Indians.' "[97]

Briggs concluded:

> Although there have been some deviations from the policy established in early years, and from time to time the purpose of the purchase has been overlooked. . . nonetheless, the true intent of the purchase was for the exclusive benefit of Indians. With this purpose in mind, the conclusion has been reached that no further charge will be made after this date. Bureau personnel should be advised immediately that these lands are hereafter to be treated, insofar as possible, like other tribal lands and at no charge.
>
> The tribes should feel free to use these lands to the greatest advantage possible in accordance with established soil conservation practices. It is recognized, of course, that this means permitting not only to Indians but to non-Indians in order that the lands may be fully utilized and the highest possible rental obtained, which will inure to the benefit of the tribes. With the discontinuance of fees, the tribes in a number of instances will have additional funds and consideration should be given to the use of these funds for the purchase of lands in their land consolidation programs.[98]

Since October 22, 1964, no charge for the surface use of the submarginal land parcels has been made to the tribes using the grazing land parcels, and the land has been assigned for tribal use, as it had been prior to 1944.

---

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

Since the charging of fees to tribes for the use of submarginal lands was "not justified" on October 22, 1964, one might wonder how the Interior Department justified the charging of fees amounting to hundreds of thousands of dollars to tribes during the period from 1944 to 1964, when the Department had "over-looked" the purpose for which the lands were acquired, inasmuch as the same legal authority to administer the lands applied throughout.

Secretary Briggs' answer is somewhat less than satisfying: "From the foregoing history, it can readily be observed that this entire question of charging fees is strictly a matter of policy and not a question of law."[99]

Since the opposite conclusion would have been tantamount to an admission that the Department had engaged in illegal conduct for 20 years, Secretary Briggs' conclusion is not surprising. But the question of whether a federal administrator may adopt policies which are in direct contradiction to his legal authority to administer the property in his charge would seem to pose a question of law, not of policy, which might lead to the conclusion that the Interior Department's fee charging practices from 1944 to 1964 may not only have been bad policy, but illegal.

As indicated above, although *surface* use of the grazing lands has been assigned to the tribes since 1964, subsurface mineral leases continue to be issued by the Bureau of Land Management, at Fort Peck, Fort Belknap and Blackfeet reservations, all in Montana, with the revenue going to the United States Treasury.

On the timbered parcels, revenues from timber-cutting permits, administered by the Bureau of Indian Affairs, are treated as mineral income, under the theory that uncut timber is a part of the realty,[100] and that until title passes to the tribe the Indians may use the surface but not remove the timber. Ultimately, upon transfer of the title to the lands in trust to the tribes as part of their reservations, discretion will remain with Congress to determine whether title to the timber resources should be awarded to the tribe. But in the absence of specific language to the contrary, transfer of the land to the tribe in trust, as part of the reservation, conveys to the Indians an interest in the timber as complete as the tribal interest in the land itself.[101] The collection of timber-cutting revenue from submarginal lands by the federal government, and the holding of it in the Federal Treasury pending transfer of the lands to the tribes, therefore, is at least arguable under federal law. Indeed, both case law and statutory law seem to recognize the right of

99. *Id.*
100. United States v. Cook, 86 U.S. (19 Wall.) 591 (1873).
101. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 315 (GPO 1945).

the federal government to continue to manage the timber for the benefit of the tribe even after transfer of title.[102] The Bureau of Indian Affairs has managed the submarginal timber lands more restrictively than the grazing lands for the *dual purpose* of conservation of the timber and benefit to the Indians, deriving its authority for the former from statutory language governing management of timber on Indian reservations generally.[103]

While legal authority for such distinctive treatment of mineral royalties and timber-cutting revenues is present, no such authority is apparent for distinctive treatment of the cleared land on timbered parcels from that on other parcels where tribes are now given free use of the surface. Yet, at Stockbridge-Munsee, the BIA was collecting and depositing small rents for surface use through 1970. Only the fact that the tribe does not have the resources to hire legal counsel would seem to explain the discrimination. The Interior Department's policy again appears to be based on power realities, not on law, a fact that may surprise those believing that the United Stated has a government of laws, not of men.

From 1957 through 1962, Congress took no action on the frequently introduced bills to deliver submarginal lands to the tribes for which they were purchased. In August of 1962, a report which had been requested by the Senate Interior Committee[104] was given to the House and Senate Interior and Insular Affairs Committees by the Office of the Comptroller General (GAO).[105] The subject of this report was the advisability of the passing of further legislation delivering trust title of the submarginal lands to the tribes. Using criteria strongly influenced by the termination policy,[106] some factual inaccuracies, and some fallacious arguments,[107] the GAO report came up with a "mixed verdict."

For three tribes it recommended enactment of the legislation.[108] For others it recommended that enactment be conditioned on demonstration of need, or of a productive tribal land use plan. For some it recommended that the land be sold to the tribe, and, for

102. United States v. Shoshone Tribe, 304 U.S. 111 (1938); for statutes *see* F. COHEN, *supra* note 101, at 308.

103. 25 U.S.C. § 196 (1970).

104. Letter of Senator Clinton P. Anderson, Chairman of the Committee on Interior and Insular Affairs, to the Comptroller General of the United States, January 27, 1962.

105. COMPTROLLER GENERAL OF THE UNITED STATES, REPORT ON REVIEW OF PROPOSED LEGISLATION FOR CONVEYANCE TO CERTAIN INDIAN TRIBES AND GROUPS OF SUBMARGINAL LANDS ADMINISTERED BY BUREAU OF INDIAN AFFAIRS DEPARTMENT OF THE INTERIOR (1962). [hereinafter referred to as REP. OF COMPTROLLER GENERAL].

106. The criteria were: "whether the various tribes had demonstrated a need for and would constructively use the submarginal land, whether the conveyance of submarginal land would influence eventual termination of Federal supervision over the tribes, whether the present financial resources of each tribe warrant the proposed donation of the land, and whether the current and potential income from submarginal land is of significant proportions."

107. Gross, *supra* note 49, at 7-11.

108. Stockbridge-Munsee; Minnesota Chippewa (White Earth); Devil's Lake (Fort Totten) Sioux.

others, particularly the Burns Paiute Colony, it opposed enactment on the ground that granting land to the "Burns Community, which is not now recognized by the Congress as a distinct Indian group, and does not own any land, [would] establish a precedent that would encourage similar groups to seek like benefits."[109] The Report repeatedly concerned itself with legislative precedent, had a separate section on the historical background of submarginal lands, yet totally failed to mention that six years before it was written, Congress had passed the Seminole submarginal land bill, a perfect precedent for the award of submarginal lands to the landless Burns Paiute Colony. This legislation had apparently been "overlooked."

No hearings were held following the rendering of the GAO Report, and the three affirmative recommendations were ignored by the Congress.

From 1962 until 1970, bills supporting delivery of the land to the tribes were repeatedly introduced into the Congress but none received a hearing.

In April, 1970, the National Council on Indian Opportunity (NCIO) conducted a field survey of 50 Indian reservations in order to obtain an appraisal of the effectiveness of federal programs serving the reservations and gain a sense of the priorities that tribes held for tribal development programs.[110] From the Stockbridge-Munsee Reservation came the report that the only immediate priority of the Stockbridge-Munsee Indian community was to obtain trust title to its submarginal lands, without which any economic development by the tribe appeared impossible, since the tribe had almost no other land base. Preliminary inquiry revealed the fact that there were many other tribes in a similar situation.

The author investigated the factual situation at each of the submarginal land reservations, and brought tribal representatives together for a joint discussion at Minneapolis, Minnesota, on August 14 and 15, 1970, at which the history of the various parcels and the past legislative efforts were discussed and strategies for future legislative action planned.

A report was prepared for NCIO which documented the foregoing history with 27 exhibits of original documents. The Report, originally entitled "Submarginal Lands: An Unkept Promise," was submitted to NCIO in January, 1971, and disappeared. Five months later, under growing pressure from a group of United States Senators who were aware of the existence of the report, NCIO finally released

109. REP. OF COMPTROLLER GENERAL *supra* note 105, at 55.

110. NATIONAL COUNCIL ON INDIAN OPPORTUNITY (NCIO), MEMORANDUM REPORT ON PROJECT OUTREACH-AN ASSESSMENT OF TRIBAL ATTITUDES AND APPRAISAL OF THE EXTENT OF TRIBAL COUNCIL EXPERIENCE IN ADMINISTERING FEDERAL ASSISTANCE PROGRAMS (1970).

it under the title "Submarginal Lands: An Unresolved Problem."[111] The Report concluded:

> The fulfillment of this promise made long ago requires passage of legislation delivering trust title to the submarginal lands to the respective tribes for whom they were purchased for use in accord with land use plans which have been legislatively approved, and delivery of that amount of accrued revenue which is appropriate. The sooner that these ends are achieved, the sooner that these tribes can move toward providing a better economic life for their people.[112]

In the 91st Congress (1969-70) more than 30 bills were introduced by Senators and Congressmen to accomplish these legislative goals. Most of the bills had been introduced more or less routinely since 1938, but no hearing had been held since 1956, and no bills had received consideration since 1962, when the GAO Report[113] was requested by the Senate Interior Committee.

Although nearly every Senator and many of the Congressmen from states affected by the bills sponsored them routinely, none of the sponsors supported bills for tribes in other states.

Of these Senators, Frank Church (D-Idaho), Quentin Burdick (D-N.D.), George McGovern (D-S.D.), and Lee Metcalf (D-Montana) among the Democrats, and Len Jordan (R-Idaho) and Mark Hatfield (R-Oregon) among the Republicans are members of the 16-man Senate Interior Committee.[114] It seems apparent that if all six Senators would support any one of the bills, only three additional votes would be needed to report the legislation to the Senate floor, where its passage would probably be routine.

The Minneapolis meeting revealed that the tribes, particularly those without legal representation, who most desperately needed the legislation, had for years depended upon the fact that because their Congressman or Senators had introduced the bills, eventually they would pass. Few noticed, or recognized the significance of the fact that some of the "sponsors" had qualified their introduction of the bill with the words "by request,"[115] language used to indicate bills which a member of Congress introduces because requested to do so by constituents, but which he does not necessarily support.

---

111. *See* note 49 *supra.*
112. *Id.* at 25.
113. *See* note 105 *supra.*
114. The Senate Interior & Insular Affairs Committee in order of descending seniority; Democrats - Anderson (N.M.), Chmn. Jackson (Wash.), Bible (Nev.), Church (Ida.), Moss (Utah), Burdick (N.D.), McGovern (S.D.), Metcalf (Mont.), Gravel (Alas.); Republicans - Allott (Colo.), Jordan (Ida.), Fannin (Ariz.), Hansen (Wyo.), Hatfield (Ore.), Stevens (Alas.), Bellmon (Okla.).
115. *E.g.,* Hon. Melvin Laird, now Secretary of Defense, former Republican Congressman from Wisconsin's Seventh District, in which the Stockbridge-Munsee Tribe is located.

Since thousands more bills are introduced into each Congress than ever receive serious consideration, bills without sponsorship seldom receive consideration.

In January, 1971, changes in the staffing of the Senate Interior Committee indicated that Chairman Jackson had apparently experienced a change of mind in his attitude about Indian affairs. The substantial embarrassment he had suffered on the floor of the Senate as a result of his opposition to the Taos Blue Lake bill, plus his own Presidential ambitions, are often cited as the reasons. In any event, Forrest Gerard, a Blackfoot Indian, was hired as Professional Staff Member of the Interior Committee staff, responsible for Indian affairs, replacing James Gamble, who had held the position for years. Gamble was made responsible for legislation affecting the trust territories.

As a direct result of the momentum generated by the Minneapolis meeting the Nixon Administration agreed to submit and began the introduction into the 92nd Congress of Administration-supported bills to deliver trust title to submarginal lands to the concerned tribes. Before introduction, the bills, drafted by the Interior Department, were subjected to a rigid clearance process by the Office of Management and Budget (OMB), designed to insure that no valuable minerals were included in the proposed transfer of title. Since most of the submarginal land parcels did not involve any mineral deposits at all, this process presented no long-range obstacle to eventual approval of the bills. However, since OMB would not accept previous mineral surveys in some cases, and had no data in others, a time-consuming mineral survey was undertaken on each reservation which needed to be completed before OMB would "clear" the bills for introduction.

First introduced were S.1217 and S.1230, to deliver trust title of submarginal lands to the Minnesota Chippewa tribe and the Stockbridge-Munsee Indian community, respectively. Favorable departmental reports were attached to the bills.

Consistent with other recent submarginal land bills, these bills failed to mention the revenues which had accrued and been deposited in the United States Treasury since the land had been purchased, although in both instances the revenue received through 1970 *exceeded* the purchase price of the land.[116]

Instead, the Administration, at the insistence of OMB, added for the first time a section to the bills which would authorize the Indian Claims Commission to consider offsetting the value of the submarginal lands against any tribal claims.[117] Thus, rather

116. *See* note 49 *supra*.
117. S 1217 § 2; S 1230 § 2, 92nd Cong., 2nd Sess. (1972).

than getting the land plus the accrued income, as President Roosevelt and Commissioner Collier had originally intended, and as Congress had approved for the Puebloes in 1949,[118] the Indians may be given the land with an opportunity to pay for it twice. If, that is, they can persuade the Congress to deliver it at all. Note that this provision is inserted despite conflicting precedent: statutory,[119] legislative,[120] and quasi-judicial.[121]

The Senate Interior Committee held hearings on the two bills before the full Committee, (not the Indian Affairs Subcommittee), on March 26, 1971. Five Senators—Anderson, Metcalf, Burdick, Fannin and Stevens—attended.

At the hearing, the two Wisconsin Democratic Senators personally appeared while the Minnesota Senators sent supportive statements. A contingent of Interior Department witnesses including BIA Commissioner Louis Bruce, delegations from both tribes, and the author testified. All witnesses supported delivery of the land to the tribes. Both tribes objected to Section 2 of the Nixon Administration bills containing the offset clause and sought the accrued revenues, at least to the extent that they exceeded the amount that the United States paid for the lands. Both tribes made plain that they needed the land desperately and would accept even the language of the present bills, if necessary, to secure passage of the bills. There was *no* unfavorable testimony.

On March 31, 1971, the Interior Committee met in "executive session"[122] to consider, among other things, report of the submarginal land bills before it. At the request of Senator Gordon Allott (R-Colorado) the Committee decided that it did not have enough information to act and requested an update of the 1962 GAO Report as a precondition to further action on the bills.[123]

The Senate Interior Committee staff wrote to the GAO requesting updates on GAO's findings with respect to the two pending bills, upon which hearings had been held.[124]

In the meantime, on about June 10, 1971, NCIO released, for the first time, its report "Submarginal Lands: An Unresolved Problem."[125] Early in October, 1971, GAO released two reports updating information with respect to the Stockbridge-Munsee[126] and White

118. *See* note 60 *supra.*
119. *See* note 55 *supra.*
120. *See* notes 60, 85 and 86 *supra.*
121. *See* note 57 *supra.*
122. "Executive Session" is a euphemism meaning a private, closed, secret session of the Committee, which only Senators who are Committee Members, and a few privileged Committee staff members are permitted to attend. Proceedings are confidential.
123. Letter of Senator Henry M. Jackson, Chairman of the Interior and Insular Affairs Committee, to Elmer B. Staats, Comptroller General of the United States, April 1, 1971.
124. *Id.*
125. *See* note 49 *supra.*
126. REP. OF THE COMPTROLLER GENERAL OF THE U.S., INFORMATION ON FEDERALLY OWNED

Earth[127] parcels, the two parcels up for consideration before the Committee. The GAO recommended, as it had in 1962, *passage* of the bills. It also noted the conflict between Section 2 and the statutory language of the Indian Claims Commission Act, predicting that the Claims Commission would disallow any offset of submarginal lands based on its prior decision in the Seminole case.[128]

On November 5, 1971, the Interior Committee met again in "executive session," now with the two additional favorable reports from GAO before it. Again Senator Allott objected to reporting the bills, on the ground that GAO had not updated its information with respect to *other* submarginal land reservations. He believed such information a necessity before action could be undertaken on the two pending bills, since passage would create a "precedent" which would open the way for the other bills to pass. The resulting debate centered on whether the Interior Committee staff had followed the instructions of the Committee. The issue was left unresolved.

In the meantime, Senator Allott indicated, in an exchange of letters with the author, that his "final decision on these bills has not yet been made."[129] Even so, the delay which has kept the bills in the Committee for more than a year following hearing appears to be the result of unstated opposition. The peculiar fact is that these bills have been pending for more than 30 years without "opposition," and without being reported from the Committee. Under these circumstances it is easy to equate delaying tactics with opposition.

All the information necessary for consideration of the Stockbridge-Munsee and White Earth submarginal land bills is before the Committee, and there is nothing contained in the GAO reports that was not previously available through tribal testimony or reports of the Interior Department and OMB.

Additionally, the Committee can obviously defy consideration of any *subsequent* bill until an updated report on *that* legislation is before the Committee. If the report contains information which would cause the Committee to withhold favorable action on the bill, it obviously can do so. A different set of facts may provide a basis for distinguishing a precedent.

While the Seminole and Pueblo cases have been ignored since 1956 there is no reason to believe that the passage of the Stockbridge-

---

SUBMARGINAL LAND PROPOSED TO BE HELD IN TRUST FOR THE STOCKBRIDGE-MUNSEE INDIAN COMMUNITY IN WISCONSIN (1971).

127. REP. OF THE COMPTROLLER GENERAL OF THE U.S., INFORMATION ON FEDERAL OWNED SUBMARGINAL LAND WITHIN THE WHITE EARTH RESERVATION IN MINNESOTA PROPOSED TO BE HELD IN TRUST FOR THE MINNESOTA CHIPPEWA TRIBE (1971).

128. Letter of P.M. Keller, Deputy Comptroller General, to Senator Jackson, Chairman, Senate Interior & Insular Affairs Committee, October 18, 1971.

129. Letter of Senator Gordon Allott to Harold M. Gross, Sept. 30, 1971.

Munsee and White Earth bills, to which no one seems to have any objection, would affect the ability of the Senate and House Interior Committees to delay bills to which there is some legitimate objection. (Clearly the Committees have the power to hold up such bills even when there is no legitimate objection). As a practical matter, many of these bills have not yet even been introduced, and hearings on such bills at this stage must be considered unlikely.

In the meantime, the effect of delay is to inflict great economic detriment on the two tribes whose bills are ready for Senate passage. The Stockbridge-Munsee tribe during 1971 lost an opportunity to bring a job-producing enterprise, in whose ownership the tribe would share, onto the reservation because of inability to insure the enterprise that the submarginal land necessary would remain available.

Both tribes have carefully thought out development plans which depend upon obtaining title to the land first promised to relieve economic hardship among the tribes in 1938. Yet the economic hardship continues to exist.

In February 1972, the Interior Committee met again in executive session, with the bills on the agenda. Reportedly, Senator Allott again objected to the two pending bills being reported, on the ground of insufficient information. Senator Metcalf reportedly suggested that further delay was inappropriate and encouraged the Committee to report the bills over Senator Allott's objection. Senator Allott then noted that a quorum of the Committee was not present, and he was prepared to object on that basis. Again the bills remained in Committee.

As this article is written the bills are again scheduled for consideration by the Senate Interior Committee in executive session.

In a court of law, so one-sided a case would probably result in a directed verdict, since the opposition, if any, would be unwilling to surface and present whatever case it may have. Dilatory tactics have been enough to prevent passage of these bills for more than 30 years, because the sole judge of whether the Interior Committee is being dilatory is the Interior Committee itself, meeting in private, secret sessions.

At the root of the delaying tactics, and ultimately the opposition to these bills, is a philosophical, categorical opposition to *any* addition to the Indian trust land base, however justifiable. This is not a position that can be legally defended, or publicly argued. It probably is not a position that represents the view of a majority of the Interior Committee, let alone a majority of the Senate. Yet, given the peculiarities of the legislative system, it is one which can obstruct what is obviously the only appropriate result

of this legislative situation: delivery of trust title to their submarginal lands to the concerned tribes—at least for a very long time.

This is not a position which can survive in the light and hopefully the recent attention focused on it will eventually force the Committee to reach the merits of the issue.

In the meantime, their hopes raised once again by recent activity, nineteen tribes wait for the Congress to act on a promise made long ago, and never kept.